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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

L.E.C.H., INC., Plaintiff and Respondent, v. AARON ARNOLD KLEIN et al., Defendants and Appellants.	B207872 (Los Angeles County Super. Ct. No. KC043993)

APPEAL from the judgment of the Superior Court of Los Angeles County. Robert A. Dukes, Judge. Affirmed.

K&L Gates LLP and Jon Michaelson; Structure Law Group, LLP and Mark R. Figueiredo, for Defendants and Appellants.

Jonathan W. Pastor, for Plaintiff and Respondent.

Defendants Aaron Arnold Klein and Tina Doreen Klein, as trustees of the Klein Family Revocable Trust, appeal from the order denying their motion for contractual attorney's fees after they prevailed in a construction defect action brought by a condominium homeowners association. Because the Kleins were not parties to the agreement by which they claim attorney's fees, we affirm.

FACTS AND PROCEDURAL HISTORY

Aaron Arnold Klein and Tina Doreen Klein, trustees of the Klein Family Revocable Trust (the Kleins) were the majority shareholders of ARK, a corporation that developed a 10 unit condominium complex in West Covina. ARK did not sell any of the units, but instead leased them out. ARK later sold the project to the Kleins, who at first continued to rent out the units, but later sold them off. As part of their ownership of the project, the Kleins formed the Lark Ellen Condominium Homeowners Association (LECH) to serve as the project's homeowners association. The Kleins served as LECH board members until they sold all 10 units.

LECH sued the Kleins for construction defects to the project, stating causes of action for breach of implied warranty, strict liability, negligence, breach of fiduciary duty, and to recover against a surety bond. The bond cause of action was dismissed before trial. During the bench trial, the Kleins's motion for judgment (Code Civ. Proc., § 631.8) was granted on the implied warranty, strict liability, and negligence causes of action. The court found the Kleins liable on the breach of fiduciary duty claim because, in their capacity as one-time LECH board members, the Kleins did not disclose their knowledge of certain defects to either LECH or the individual homeowners. The trial court awarded LECH damages of $60,800. The Kleins appealed and we reversed the judgment because as LECH board members, the Kleins had no fiduciary duty of disclosure to the individual buyers and because there was no evidence that LECH was harmed by any failure to disclose. (*L.E.C.H., Inc. v. Klein* (Aug. 27, 2007, B188521) [nonpub. opn.] (*LECH I*).) As part of our discussion, we noted that the individual buyers might have had, but did not pursue, causes of action in their own right for such a breach.

(*LECH I, supra,* slip opn. at p. 6, fn. 5.) We rejected LECH's cross-appeal as to the motion for judgment on the other causes of action, holding that LECH had sued the wrong party because the project was developed by ARK, not by the Kleins.

On remand, the Kleins brought a motion for contractual attorney's fees, contending they were awardable under the sales agreements between them and the 10 individual owners of the condo units. That motion was denied because the Kleins were not parties to those agreements. The Kleins contend the trial court erred.

DISCUSSION

Civil Code section 1717, subdivision (a)[1] provides: "In any action on a contract, where the contract specifically provides that attorney's fees and costs, which are incurred to enforce that contract, shall be awarded either to one of the parties or the prevailing party, then the party who is determined to be the party prevailing on the contract, whether he or she is the party specified in the contract or not, shall be entitled to reasonable attorney's fees in addition to other costs." The Kleins moved to recover their attorney's fees under this section, contending that LECH's action was on the sales contracts entered by each individual unit owner, which contained a provision for attorney's fees in actions arising out of the agreements. The trial court denied the motion because LECH was not a party to any of those purchase agreements.

In order to resolve this issue, we must first explain the context of LECH's participation in this action. Section 1368.3 provides that a condominium homeowners association "has standing to institute, defend, settle, or intervene in litigation, arbitration, mediation, or administrative proceedings in its own name as the real party in interest and without joining with it the individual owners of the common interest development, in matters pertaining to the following: [¶] (a) Enforcement of the governing documents. [¶] (b) Damage to the common area. [¶] (c) Damage to a separate interest that the association is obligated to maintain or repair. [¶] (d) Damage to a separate interest that

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1 All further undesignated section references are to the Civil Code.

arises out of, or is integrally related to, damage to the common area or a separate interest that the association is obligated to maintain or repair." Through this provision, the Legislature has given homeowners associations the requisite privity of contract needed to assert causes of action for breach of implied warranty or to seek compensation under any other legal theory for the types of damages set forth in subdivisions (b) through (d) of section 1368.3. (*Windham at Carmel Mountain Ranch Assn. v. Superior Court* (2003) 109 Cal.App.4th 1162, 1171-1174 (*Windham*) [interpreting the predecessor version of section 1368.3, found at former Code Civ. Proc., § 383].) It was enacted to invalidate an appellate court decision which held that a condominium homeowners association could not bring a construction defect action against a grading contractor because the association did not own or possess the common area of the property and therefore lacked standing to sue. (*Id.* at p. 1171.) Under this section, the individual unit owners still retain privity of contract to assert their individual causes of action against their project's developer. (*Id.* at p. 1176.) In its complaint, LECH alleged that it brought the action "on its own behalf, as a real party in interest, and in a representative capacity, on behalf of all of the owners of the condominium units located at the subject property."

The Kleins contend the fee provision is applicable because: (1) LECH's causes of action arose from and were therefore necessarily based on the individual unit owners' purchase agreements; and (2) LECH alleged that it sued in a representative capacity on behalf of the individual owners, asserted claims for damages to individual units that belonged to the unit owners, and asked for attorney's fees in its complaint. As a result, it would have been awarded fees had it prevailed, entitling the Kleins to their fees under the rule of reciprocity embodied in section 1717, subdivision (a).

The quick answer to the Kleins' contentions is that the attorney's fee provision in the purchase agreements was expressly limited to actions between the buyer and seller.[2]

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[2] Paragraph 22 of the purchase agreement states: "In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non-prevailing

Accordingly, the provision is inapplicable on its face because although the Kleins were the sellers under the purchase agreements, LECH was not a buyer. (*Blickman Turkus, LP v. MF Downtown Sunnyvale, LLC* (2008) 162 Cal.App.4th 858, 896 (*Blickman Turkus*).) In short, this was not an action between buyer and seller, as required by the purchase agreements, but was instead an action by a homeowners association against the parties who sold the individual buyers their units.

The Kleins' asserted grounds for avoiding this rule do not change the outcome. Although LECH's complaint prayed for attorney's fees, it qualified the request by stating that it sought such fees "if permissible by law."[3] Furthermore, LECH's complaint never mentioned the purchase agreements and did not include them as exhibits. Regardless, even if LECH sought attorney's fees in the event it prevailed, if it was not *actually* entitled to such fees, then neither were the Kleins as non-signatories to the purchase agreements. (*Blickman Turkus, supra,* 162 Cal.App.4th at p. 899.)[4] Because LECH was not a buyer, it was not entitled to recover attorney's fees.[5]

As for the Kleins' notion that LECH would have been entitled to recover its attorney's fees had it prevailed because it was effectively asserting the individual unit

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Buyer or Seller," except to a prevailing party buyer or seller who sued without complying with the agreement's mandatory mediation provision.

[3] As the trial court noted when denying the Kleins' fees motion, LECH never alleged a legal or factual basis for attorney's fees.

[4] Although other appellate courts have held that one party's mere request for attorney's fees entitles a prevailing non-signatory to fees even if the signatory party did not actually possess that right, the more recent and better reasoned trend has been to deny fees in such cases. (See *Blickman Turkus, supra,* 162 Cal.App.4th at pp. 897-902, and cases cited therein.) Accordingly, we decline to follow the several contrary decisions relied on by the Kleins.

[5] The Kleins make much of LECH's allegation that it sued on behalf of the individual owners because that language is not part of section 1368.3. From this, they ask us to conclude that LECH must have been suing to enforce the individual owners' rights under their purchase agreements. We reject this because LECH lacked standing to do so, making the language mere surplusage.

owner's rights arising from their purchase agreements, the trial court found to the contrary. At the hearing on the Kleins' attorney's fees motion, the trial court made clear that nothing in the complaint or the causes of action showed that LECH was claiming an assignment of rights under the purchase agreements by the individual buyers or was otherwise basing its claims on those agreements. Instead, the court acknowledged that it "muddied up the waters" and "lost sight of the forest through the trees" when it "started looking at the obligations under the . . . contract of sale, and then I did my own assignment, I think, when I . . . made my ruling, and it was not something that the . . . plaintiffs had either urged or was their theory." Although the Kleins point to instances in the record where the purchase agreements were mentioned, or where unit owners testified about damage to their units, they do not address this finding, and we therefore deem it waived.

We alternatively hold that to the extent LECH might have sought damages to the individual owners' units, it had standing do so to if it was either obligated to maintain or repair the damage or the damage was integrally related to damage to the common area. (§ 1368.3, subds. (c), (d).) If so, then LECH was asserting its own statutorily granted standing based on damages that affected the common areas, while leaving intact the individual unit owners' privity of contract in order to assert their own individual claims if they so chose. (*Winhdam, supra,* 109 Cal.App.4th at pp. 1171-1174, 1176.) The Kleins do not address this possibility and we therefore deem it waived as well.

At bottom, the right to recover attorney's fees under the unit owners' purchase agreements was expressly limited to actions between the buyer and seller. That was not the case here, making the fee provision inapplicable.

DISPOSITION

For the reasons set forth above, the order denying the Kleins' motion for attorney's fees is affirmed. Respondent shall recover its appellate costs.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

BIGELOW, J.